REIGNMONT ESTATE SDN BHD

v.

JAYA IKATAN PLANTATIONS SDN BHD

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
ABDUL AZIZ RAHIM JCA
MOHAMAD ARIFF YUSOF JCA
[CIVIL APPEAL NO: P-02(NCVC)(W)-2170-09-2012]
24 OCTOBER 2013

CONTRACT: *Sale and purchase of land - Specific performance - Approval of Estate Land Board - National Land Code, s. 214A - Whether obtained by vendor - Premature termination of contract by vendor - Whether vendor had knowledge of approval - Terms in agreement - Whether option to terminate agreement lay with purchaser - Whether purchaser ready and willing to complete purchase - Whether sale and purchase agreement invalid - Whether unconscionable to resist purchaser's claim for specific performance*

CONTRACT: *Termination - Right to terminate - Fundamental term - Sale and purchase of land - Approval of Estate Land Board - National Land Code, s. 214A - Whether obtained by vendor - Option to terminate agreement lay with purchaser - Premature termination of contract by vendor - Whether vendor had right to terminate agreement - Contracts Act 1950, s. 36(2)*

CONTRACT: *Contingent contract - Dependent upon obtaining approval from Estate Land Board - National Land Code, s. 214A - Sale and purchase of land - Approval obtained but vendor had no knowledge of it - Premature termination of contract by vendor - Whether termination unlawful - Whether option to terminate agreement lay with purchaser - Whether sale and purchase agreement invalid - Whether specific performance of contract granted - Contracts Act 1950, s. 36(2)*

A sale and purchase agreement ('SPA') dated 13 December 2007 was entered into between the purchaser ('appellant') and the vendor ('respondent') in respect of an estate land. The sale of the land required the approval of the Estate Land Board ('the Board') under s. 214A of the National Land Code. Since no approval was secured from the Board within the contracted stipulated period, the respondent issued a notice of termination in respect of the sale and purchase contract. This was challenged by the appellant

and thus, a claim was filed for, *inter alia*, specific performance of the contract. Based on the SPA, the balance purchase price was to be paid within four months from the date the appellant's solicitors received a written confirmation from the respondent's solicitors that the Board's approval had been obtained. Under the amended cl. 4(e) of the SPA, the appellant was granted the option to terminate the agreement if the Board's approval was not obtained within the application time. The application time was then shortened to three months as reflected in cl. 4 of the supplemental agreement dated 16 August 2010. However, it was the respondent's stand that the SPA and the supplemental agreement were deemed to be void by operation of s. 36(1) of the Contracts Act 1950 ('the Act'), which covered the legal effects of a contingent contract in the event the contingent event (Board's approval) was not satisfied. In dismissing the appellant's claim, the High Court held that the respondent's action pursuant to s. 36(2) of the Act to terminate the contract was lawful considering the deadline to obtain the Board's approval or the validity of the SPA had expired. Hence, this appeal. The appellant contended, *inter alia*, that (i) the High Court Judge had not fully considered the effect of cl. 4(e); and (ii) it was ready and willing to complete the purchase of the property.

Held (allowing appeal; setting aside decision of the High Court)

Per Mohamad Ariff Yusof JCA delivering the judgment of the court:

(1) The approval had in fact been given by the Board much earlier on 28 September 2008, with the relevant certificate indorsing the sale issued on 9 October 2008. This was obviously before the amendment to cl. 4(e) and the signing of the supplemental agreement. The respondent, however, acknowledged that the approval had been procured in 2008, *albeit*, without its knowledge. The responsibility to obtain this approval was spelt out in the SPA and the respondent had a duty to inquire as to the status of the application and to follow-up on it. The evidence did not disclose any immediate follow-up after the signing of the supplemental agreement. Hence, the termination of the SPA and the supplemental agreement was premature since there was no rejection by the Board at the time of the alleged termination. (paras 4, 23 & 26)

(2) In any event, if the application time had been re-set by the supplemental agreement, it would have been incumbent on the respondent to submit a fresh application for approval or at least to formally contact the "Pengarah" for the department to reconsider the earlier application for approval. Had the solicitors for the respondent did so, they would have most probably found out much earlier that approval had indeed been given in 2008. (para 36)

(3) Clause 4(e) of the agreement was a fundamental term in the contract and it directly related to the right of termination. A failure to consider this clause led to a fundamental misdirection by the High Court on the law and facts. The High Court had adopted a purely textual approach of cl. 4 of the supplemental agreement and should have properly considered the effect of the approval and the certificate of approval in these circumstances. The trial court also failed to consider the amended cl. 4(e) which allowed the appellant as the purchaser to elect to terminate the contract at any time thereafter prior to the completion of the agreement, whether the said approval was subsequently obtained or not. (para 35)

(4) The SPA and the supplemental agreement could not have been found to be void. The approval had been secured and therefore, this was not a case of the contingent event becoming impossible of performance. Until the condition was fulfilled, future performance under the contract remained unenforceable and when that condition was fulfilled, the contract became complete and effective (*National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd;* foll*)*. The principle applied in the context of s. 36 of the Act, which is concerned within a specified uncertain event happening within a specified time. (paras 29-32)

(5) The option to terminate the agreement lay with the appellant, whether under the original cl. 4(e) or the amended clause. Quite apart from the undisputed fact that approval had been secured even before the supplemental agreement was signed, the respondent could not arrogate to itself to terminate for the perceived failure of the contingent condition. No doubt the option gave an advantage to the appellant, but where the parties had agreed to such terms, however onerous they might be to one party, the parties had to be held bound by these terms. (para 33)

(6) The appellant had, by its conduct, consistently maintained that it was willing to proceed with the transaction. There was no credible evidence upon which the High Court could conclude that the appellant, through its conduct, manifested an unwillingness to perform its side of the bargain. Further, the deposit sum of RM1,264,800 was paid and that was not a small sum to be dismissed as not supporting an inference of a readiness and willingness to perform the contract. (paras 37, 38 & 40)

(7) With reference to s. 11(2) of the Specific Relief Act 1950, there was a presumption that breach of a contract to transfer immovable property could not be adequately compensated in money terms. The facts and circumstances of this appeal could not, on an objective view, be said to be sufficient to rebut this presumption. It would be unconscionable and wrong in law to allow the respondent to resist the appellant's claim for specific performance against the clear evidence that approval had in fact been given by the Board in 2008 which at once made the contract unconditional and capable of specific performance. The purported termination by the respondent was therefore unlawful. (paras 43 & 44)

Bahasa Malaysia *Translation Of Headnotes*

Satu perjanjian jual beli ('PJB') bertarikh 13 Disember 2007 telah dimasuki di antara pembeli ('perayu') dan penjual ('responden') berkenaan satu tanah estet. Penjualan tanah tersebut memerlukan kelulusan Lembaga Tanah Estet ('Lembaga') di bawah s. 214A Kanun Tanah Negara. Memandangkan tiada kelulusan diperolehi daripada Lembaga dalam masa yang ditetapkan, responden telah mengeluarkan notis penamatan bagi kontrak jual beli itu. Perkara ini dicabar oleh perayu dan oleh itu, satu tuntutan telah difailkan untuk menuntut, antara lain, pelaksanaan spesifik kontrak. Berdasarkan PJB, baki harga jualan hendaklah dibayar dalam masa empat bulan dari tarikh peguamcara perayu menerima pengesahan bertulis daripada peguamcara responden bahawa kelulusan Lembaga telah diperolehi. Di bawah kl. 4(e) terpinda PJB, perayu diberi pilihan untuk menamatkan perjanjian jika kelulusan Lembaga tidak diperolehi dalam tempoh permohonan. Kemudian, tempoh permohonan telah disingkatkan kepada tiga bulan seperti dalam kl. 4 perjanjian tambahan bertarikh 16 Ogos 2010. Walau

bagaimanapun, adalah penegasan responden bahawa PJB dan perjanjian tambahan dianggap sebagai tidak sah melalui peruntukan s. 36(1) Akta Kontrak 1950 ('Akta'), yang merangkumi kesan dari segi undang-undang kontrak kontingen jika keadaan kontingen tersebut (kelulusan Lembaga) tidak dapat dipatuhi. Dalam menolak tuntutan perayu, Mahkamah Tinggi memutuskan bahawa tindakan responden berikutan s. 36(2) Akta untuk menamatkan kontrak adalah sah memandangkan tempoh luput untuk memperolehi kelulusan Lembaga atau kesahan PJB telah pun tamat. Oleh itu, rayuan ini. Perayu berhujah, antara lain, bahawa (i) Hakim Mahkamah Tinggi tidak, dengan sepenuhnya, mempertimbangkan kesan kl. 4(e); dan (ii) ia bersedia dan sanggup menyelesaikan pembelian hartanah tersebut.

Diputuskan (membenarkan rayuan; menolak keputusan Mahkamah Tinggi)
Oleh Mohamad Ariff Yusof HMR menyampaikan penghakiman mahkamah:

(1) Kelulusan telah pun diberi oleh Lembaga lebih awal lagi pada 28 September 2008, dengan sijil relevan mengindorskan jualan yang dikeluarkan pada 9 Oktober 2008. Ini adalah sebelum pindaan kepada kl. 4(e) dan perjanjian tambahan ditandatangani. Responden, walau bagaimanapun, mengakui bahawa kelulusan telah diperolehi pada tahun 2008, walaupun tanpa pengetahuannya. Tanggungjawab untuk memperolehi kelulusan ini dinyatakan dalam PJB dan adalah tugas responden untuk mengetahui status permohonan dan mengikutinya. Keterangan tidak mengemukakan sebarang tindakan mengikutinya selepas perjanjian tambahan ditandatangani. Oleh itu, penamatan PJB dan perjanjian tambahan adalah pra masa memandangkan tiada penolakan oleh Lembaga pada masa penamatan.

(2) Dalam sebarang keadaan, jika tempoh masa permohonan telah ditetapkan semula melalui perjanjian tambahan, ia adalah kewajipan responden untuk mengemukakan permohonan baru bagi kelulusan atau sekurang-kurangnya menghubungi Pengarah jabatan tersebut untuk mempertimbangkan semula permohonan awal bagi kelulusan. Jika peguamcara responden berbuat demikian, mereka mungkin akan mengetahui lebih awal lagi bahawa kelulusan telah pun diberi pada tahun 2008.

(3) Klausa 4(e) perjanjian adalah terma penting dalam kontrak dan ia berkaitan dengan hak penamatan. Kegagalan untuk mempertimbangkan klausa ini menjurus kepada suatu salah arah oleh Mahkamah Tinggi atas undang-undang dan fakta. Mahkamah Tinggi telah mengambil pendekatan berunsur teks bagi kl. 4 perjanjian tambahan dan sepatutnya mempertimbangkan efek kelulusan dan sijil kelulusan tersebut dalam keadaan ini. Mahkamah bicara juga gagal mempertimbangkan kl. 4(e) yang membenarkan perayu sebagai pembeli memilih untuk menamatkan kontrak pada bila-bila masa selepas itu sebelum penyelesaian perjanjian, sama ada kelulusan diperolehi atau tidak selepas itu.

(4) PJB dan perjanjian tambahan tidak boleh didapati terbatal. Kelulusan telah pun diperolehi dan oleh itu, ini bukanlah satu kes di mana kejadian kontingen menjadi tidak mungkin untuk dilaksanakan. Sehingga syarat disempurnakan, pelaksanaan masa depan di bawah kontrak masih tidak boleh dikuatkuasakan dan apabila syarat itu disempurnakan, kontrak itu menjadi lengkap dan efektif (*National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd;* diikuti). Prinsip ini terpakai dalam konteks s. 36 Akta, yang berkaitan dengan keadaan tidak tentu berlaku dalam suatu tempoh masa yang ditetapkan.

(5) Pilihan untuk menamatkan perjanjian terletak atas bahu perayu, sama ada di bawah kl. 4(e) terdahulu atau pun dalam klausa terpinda. Berbeza dengan fakta yang tidak dipertikaikan bahawa kelulusan telah diperolehi walaupun sebelum perjanjian tambahan ditandatangani, responden tidak boleh mengambil alih untuk menamatkan perjanjian bagi kegagalan syarat kontingen. Walaupun pilihan itu memberi faedah kepada perayu, tetapi di mana pihak-pihak telah bersetuju atas terma-terma sebegitu, walaupun ia membebankan kepada satu pihak, pihak-pihak perlulah terikat dengan terma-terma tersebut.

(6) Perayu telah, melalui tindakannya, mengekalkan bahawa ia bersedia untuk meneruskan dengan transaksi itu. Tiada keterangan kredibel di mana Mahkamah Tinggi boleh menyimpulkan bahawa perayu, melalui tindakannya, menunjukkan ketidakmahuan untuk melaksanakan tanggungjawabnya. Tambahan, jumlah deposit sebanyak RM1,264,800 telah dibayar dan jumlah tersebut bukanlah kecil untuk ditolak sebagai tidak menyokong inferens kesediaan dan kehendak untuk melaksanakan kontrak.

(7) Merujuk kepada s. 11(2) Akta Relif Spesifik 1950, terdapat anggapan bahawa pelanggaran kontrak untuk memindah milik harta tak alih tidak boleh dipampaskan dengan wang. Fakta dan keadaan rayuan ini tidak boleh, atas pandangan objektif, dikatakan mencukupi untuk mematahkan anggapan ini. Adalah tidak adil dan salah di sisi undang-undang untuk membenarkan responden menolak tuntutan perayu untuk pelaksanaan spesifik terhadap keterangan jelas bahawa kelulusan telah pun diperolehi daripada Lembaga pada tahun 2008 yang membuatkan kontrak tanpa syarat dan layak untuk pelaksanaan spesifik. Pembatalan kononnya oleh responden adalah, dengan itu, tidak sah.

Case(s) referred to:

Goh Hooi Yin v. Lim Teong Ghee & Ors [1990] 2 CLJ 203; [1990] 2 CLJ (Rep) 48 HC ***(foll)***

National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 CLJ 76; [1983] CLJ (Rep) 282 FC ***(foll)***

Reginald Ernest Vere Denning v. David Geoffrey Edwardes [1961] AC 248 ***(foll)***

Thirugnanam v. Dr R Jagan Mohan Rao AIR 1996 SC 116 ***(foll)***

Legislation referred to:

Contracts Act 1950, ss. 33, 36(1), (2)
National Land Code, s. 214A
Specific Relief Act 1950, s. 11(2)

For the appellant - Mahinder Singh Dulku; M/s Mahinder Singh Dulku & Co

For the respondent - Wong Yee Chue; M/s YC Wong

[Editor's note: For the Court of Appeal judgment, please see Reignmont Estate Sdn Bhd v. Jaya Ikatan Plantations Sdn Bhd [2012] 1 LNS 877.]

Reported by Kumitha Abd Majid

JUDGMENT

Mohamad Ariff Yusof JCA:

Introduction

[1] This was an appeal by the plaintiff in the High Court after a full trial in a case where the subject matter of the claim was essentially for specific performance of the sale and purchase agreement relating to a piece of land in Baling, Kedah, with a total

A area originally described as 117 ha. Being an estate land (an oil palm plantation), the sale of the land required the approval of the Estate Land Board under s. 214A of the National Land Code. The dispute revolved around the legal effect of non-approval by the Estate Land Board within the stipulated contractual period,
B and whether the remedy of specific performance could lie where the plaintiff could not be shown to be ready and willing to perform the sale and purchase contract.

[2] The defendant as vendor issued a notice of termination of
C the sale and purchase contract, purportedly because no approval was secured from the Estate Land Board within the contracted stipulated period. This was challenged by the plaintiff as purchaser and hence, the plaintiff filed this claim seeking *inter alia* for specific performance of the sale and purchase contract.

D

[3] The High Court dismissed the plaintiff's claim for specific performance, and allowed the counterclaim by the defendant for the removal of a caveat lodged against the land by the plaintiff. The High Court also ordered a refund of the deposit paid by the
E plaintiff to the defendant and further that each party was to bear its own costs.

[4] We allowed the appeal by a unanimous decision. We were of the view that the termination of the sale and purchase contract (more exactly, the sale and purchase agreement dated
F 13 December 2007 and the supplemental agreement dated 16 August 2010) was premature since there was no rejection by the Estate Land Board at the time of the alleged termination. We were also of the view that there were no merits in the argument advanced by the defendant (now the respondent in this appeal)
G that the plaintiff (now the appellant) was not ready and willing to proceed with the sale and purchase contract. We ordered agreed costs of RM25,000 for the appeal proper, and further ordered that the High Court order on costs was to remain. The order of the High Court was set aside and we entered judgment for the
H plaintiff as per prayer 17(a) of the statement of claim for specific performance.

[5] We did not however allow the alternative claim for damages, since specific performance was allowed in the circumstances.

I

[6] At the outset of the hearing, the respondent had raised a preliminary objection by letter, on the basis that the appellant must be taken to have abandoned its right to appeal since it had

chosen to accept the refund of the deposit sum as ordered by the High Court. We found no merit in the preliminary objection; the appellant was merely acting on the High Court order and therefore this fact could not be held against it.

Background Facts

[7] As indicated earlier, the sale and purchase agreement between the respondent as vendor and the plaintiff as purchaser in respect of the Estate Land was entered into in 2007, the agreement being dated 13 December 2007, and with the property described as that piece of land in Baling, Kedah, measuring approximately 408 Relongs 106 Jembas "together with all existing oil palm plants, building/fittings/fixtures erected thereon." The total land area worked out to be approximately 117 ha. The parties had the understanding that the total land area could be less after taking into consideration any acquisition by the relevant authorities. The purchase price stipulated was RM12,648,000 with a deposit sum of RM1,264,800 to be paid by the purchaser to the vendor's solicitors to hold as stakeholders by way of "deposit and part payment towards the account of the purchase price." This was made clear in cl. 1(a) of the sale and purchase agreement. Clause 2 of the SPA provided for the manner of payment of the balance purchase price which shall be paid in full in accordance with s. 3(b) of the second schedule which reads:

> The Balance Purchase Price shall be paid within four (4) months from the date of receipt by the Purchaser's solicitors of a written confirmation from the Vendor's solicitors that the Board's approval has been obtained (hereinafter referred to as "the Completion Date") with an extension of a further one (1) month (hereinafter referred to as "the Extended Completion Date") subject to the payment of interest at the rate of 6.5% per annum on the unpaid balance of the Purchase Price calculated on daily basis until full payment of the Balance Purchase Price.

[8] Thus, from the above provision the balance purchase price was to be paid within four months (with an additional one month's extension) from the date the appellant's solicitors received a written confirmation from the respondent's solicitors that the board's approval had been obtained.

[9] The SPA clearly obligated the respondent as vendor to apply to the board for the approval, and that approval "must be granted" within four months from the date of the SPA, defined by

A the SPA as "the application time". The relevant provisions in this connection were cl. 3(c) and cl. 4. Clause 3(c), for instance, made clear that the sale of the land was subject to, *inter alia*, the term and condition that the "approval of the Estate Land Board being obtained by the vendor at his own cost and expense."

B

[10] Clause 4 then specified in greater detail what was required to be done by the vendor and the legal effects of a rejection of the application for approval.

C **Clause 4(a)-(e)**

[11] Clause 4, headed "Approval of Estate Land Board", specified the following:

(a) The vendor was to apply to the Estate Land Board within
D 14 days from the date of the SPA, or where applicable, from the date when the vendor received the necessary information and/or documents that were necessary for obtaining the approval (cl. 4(a)).

E (b) The vendor was to do all acts and furnish all information and/or documents that were necessary for obtaining the approval (cl. 4 (b)).

(c) The parties agreed that the board's approval must be granted within "the application time" ie, within four months from the
F date of the SPA (cl. 4(c)).

(d) In the event the board's approval was rejected, even though the vendor had exhausted all avenues of appeal, the SPA was to be aborted and the vendor was to refund the deposit sum
G together with interest thereon to the purchaser within seven days from the date of rejection (cl. 4 (d)). In this event, the purchaser was also to return all documents executed by the vendor to the vendor's solicitors for cancellation and thereafter the parties were not to have any claim against each other.

H

[12] The appellant as purchaser was nevertheless granted an "option", spelt out in cl. 4(e), to elect whether to await further for the approval, even though approval was not obtained within the "application time", or to terminate the agreement. This
I provision was subsequently amended by agreement of the parties by an exchange of letters dated 13 January 2009 and 22 January 2009 (see pp. 202-203, appeal record, vol. 2 (2), parts B and C).

[13] Clause 4(e), as it originally stood in the SPA, stated:

> In the event that the Board's Approval is not obtained by the Application Time despite the best endeavour of the Vendor, then the Purchaser shall at any time thereafter have the option whether further await the said Approval or to terminate this Agreement. If the Purchaser shall exercise the option to terminate this Agreement the Vendor shall within seven (7) days from the termination refund to the Purchaser the Deposit sum together with the interest incurred thereon from the fixed deposit account as mentioned in Clause 1(b) hereof and the Purchaser or his solicitors shall return all documents (if any) executed by the Vendor to the Vendor's solicitors for cancellation and thereafter no parties shall have any claim against each other.

The Amended Clause 4(e)

[14] The amended cl. 4(e) read:

> In the event that the Board's Approval is not obtained by the Application Time despite the best endeavour of the Vendor, then the Purchaser shall at any time thereafter **prior to the completion of the Agreement (whether the said Approval shall have subsequently obtained or not**) have the option whether to terminate this Agreement. If the Purchaser shall exercise the option to terminate this Agreement the Vendor shall within seven (7) days from the termination refund to the Purchaser the Deposit sum together with the interest incurred thereon from the fixed deposit account as mentioned in Clause 1(b) hereof and the Purchaser or his solicitors shall return all documents (if any) executed by the Vendor to the Vendor's solicitors for cancellation and thereafter no parties shall have any claim against each other. (The amended parts are emphasis added.)

[15] Whereas under the original clause the appellant was given the option to elect whether to continue with the agreement or to terminate it, if approval was not obtained within the application time, under the amended provision the appellant was granted the option to terminate the agreement if the approval was not obtained within the application time "whether the said approval shall have subsequently been obtained or not".

[16] We noted that the amended option granted to the appellant allowed it to elect to terminate at any time "thereafter prior to the completion of this agreement", which could only plausibly refer to the "completion date", namely the four months after receipt of any approval for the balance purchase price to be paid. Despite any

latent ambiguity that might arise, it was nevertheless apparent on its wording that the option was granted to the appellant as purchaser, not the respondent as vendor.

[17] The amended cl. 4(e) did not appear in the supplemental agreement which the parties signed and dated 16 August 2010.

The Supplemental Agreement

[18] The supplemental agreement, although signed in May 2010, was dated 16 August 2010. It adjusted the purchase price from RM12,648,000 to RM12,591,881.08, with consequential amendment to the balance purchase price which then became RM11,327,081.08. The adjustment took into account the acquisition by the state authorities of 0.5212355 ha of the land earlier in 1999.

[19] Clause 4(e) was not amended through this supplemental agreement (as noted earlier, this amendment was effected by exchange of letters in January 2009), but there was a significant change to the application time which was shortened to three months. This was reflected in cl. 4 of the supplemental agreement:

> The Application Time pursuant to Clause 4 (c) of the SPA shall be amended to three (3) months from the date of this Supplemental Agreement.

[20] It was evident, at least from the formal terms of the supplemental agreement, that the parties at that stage were still under the impression that no approval had been obtained from the Estate Land Board. Given the amended application time of three months calculated from the date of the supplemental agreement, and when no approval was conveyed to the respondent within this time, the respondent then issued its termination notice through its solicitors' letter dated 3 December 2010. By this letter from Messrs Amir & Lee, the respondent conveyed its position that the SPA and the supplemental agreement were therefore deemed to be void by operation of s. 36(1) of the Contracts Act 1950 which covered the legal effects of a contingent contract in the event the contingent event (here, the board approval) was not satisfied:

> Section 36(1)
>
> Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, the event has not happened, or if, at the expiration of the time fixed, the event becomes impossible.

[21] The respondent argued it had the right to terminate in view of the amendment to cl. 4(e) which took away the option granted to the appellant to elect to terminate "at any time thereafter". The appellant on the other hand argued s. 4(e) remained unaffected since it was not expressly amended in the supplemental agreement, maintaining its stand that only the appellant had the right to elect for termination.

[22] In this matrix of facts and the competing arguments, one extraordinary event featured, and that was in relation to the earlier application for approval.

Approval On 28 September 2008

[23] The approval had in fact been given by the Estate Land Board much earlier on 28 September 2008, with the relevant certificate indorsing the sale issued on 9 October 2008, apparently without the knowledge of the parties. This was very obviously before the amendment to cl. 4(e) and the signing of the supplemental agreement.

[24] On the evidence, it appeared that the fact of approval having been given came to the appellant's knowledge when its solicitors wrote to the Pengarah Tanah dan Galian, Alor Setar on 5 July 2011 to inquire on the status of the application. It was then that it was informed approval had been given. The letter in response to the inquiry from the Pejabat Pengarah came on 14 July 2011, which also said:

> ... Pentadbiran ini telah mengemukakan sijil tersebut kepada Peguambela dan Peguamcara Tetuan Amir & Lee [the Respondent's solicitors] seperti di salinan berkelat.

[25] According to the respondent's solicitors, they did not receive this letter since it was apparently sent to the old address of the solicitors. This explanation can be found in the letter from Amir & Lee dated 16 August 2011. By letter dated 18 August 2011, the same solicitors wrote:

> Tujuan kami menulis ialah untuk memohon pihak tuan agar salinan "Certified True Copy" untuk surat-surat bertarikh 1.2.2010, 13.10.2008 bersama-sama dengan Sijil Kebenaran Pindah Milik bertarikh 9.10.2008.

A Pihak kami berharap agar tuan dapat menyediakan salinan-salinan dokumen seperti yang diminta di atas pada kadar segera dan "despatch rider" pihak kami senantiasa bersedia untuk hadir di pejabat tuan bersama-sama dengan fee bagi mengutip dokumen-dokumen tersebut.

B **[26]** The respondent thus acknowledged the approval had been procured in 2008, *albeit* without its knowledge. However, the responsibility to obtain this approval was spelt out in the SPA as reposed in the respondent, and by this token the respondent must surely have the duty to inquire as to the status of the application, C and to follow-up on it. In fairness to the respondent, there was a follow-up before the supplemental agreement was signed in the form of a letter written by Amir & Lee dated 13 May 2009 to the Menteri Besar, Kedah, to inquire on the status. This letter was copied to the solicitors for the appellant. According to the D witness from Amir & Lee (DW2), they were informed by the "land authority's staff" that the actual net land area had to be ascertained first before approval could be given. The solicitors then proceeded to prepare the supplemental agreement to reflect the actual land area and made the necessary adjustment to the E purchase price. The evidence did not disclose any immediate follow-up after the signing of the supplemental agreement although they had been allegedly informed approval would be decided when the net land area was determined.

F **[27]** There were some unsupported allegations made by the respondent in its submission that the appellant had earlier knowledge of the approval and that prompted it to request for the amendment to cl. 4(e) which allowed it to still elect to terminate although approval was obtained. With respect, this argument was G far-fetched and flew against the available evidence. Why would the appellant proceed to sign the supplemental agreement with a shorter application time if it had known approval had been given?

[28] In the same light, the insinuation by the respondent that the H appellant had not acted on the approval having been given and complete the sale according to the SPA because it was still securing a third party to purchase the land from it, was without plausible basis.

I

Legal Effects Of Section 33 And 36 Of Contracts Act

[29] Given these circumstances, we were of the opinion that the SPA and the supplemental agreement could not have been found to be void. The fact of the matter was, approval had been secured and therefore this was not a case of the contingent event becoming impossible of performance, much less not secured within the contracted time. Approval was given and at that point of time, the contingent contract could then be enforced by law, in keeping with the underlying rationale in s. 33(a) and (b):

> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts become void.

[30] The Supreme Court's decision in *National Land Finance Co-operative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 CLJ 76; [1983] CLJ (Rep) 282; [1983] 2 MLJ 211, which discussed and decided on the legal effects of a contingent condition under s. 33, Contracts Act, supported this legal position. The relevant passage in the judgment of the Supreme Court was cited to us and we reproduce the same (the contingent there was approval from the FIC):

> Until the FIC approval was given liability for further performance remained unenforceable i.e. suspended although neither the Respondents nor the Appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled.
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> This is in effect laid down by section 33(a) of the Contracts Act ... As the approval in this case was refused it means that contingent event becomes impossible of performance and the Agreement therefore becomes void in accordance with section 33(b) ..." (per Salleh Abas CJ (Malaya) (as he then was) at p. 289 (CLJ); p. 218 (MLJ)).

[31] What this passage laid down was clear: until the condition was fulfilled, future performance under the contract remained unenforceable; when that condition was fulfilled, the contract became complete and effective. The Privy Council in *Reginald*

Ernest Vere Denning v. David Geoffrey Edwardes [1961] AC 248 (also cited before us) categorised such a contract as "inchoate" until the condition was fulfilled. These statements of the law were of high authority, and they were applicable to the facts of this present appeal.

[32] With respect, the same underlying principles applied in the context of s. 36, which is concerned within "a specified uncertain event" happening "within a specified time".

[33] These are general principles of contract law, which had to be read against the express agreement of the parties. It seemed clear to us that the option to terminate lay with the appellant, whether under the original cl. 4(e) or the amended clause. Quite apart from the undisputed fact that approval had been secured even before the supplemental agreement was signed, the respondent could not arrogate to itself to terminate for the perceived failure of the contingent condition. No doubt the option gave an advantage to the appellant, but where parties have agreed to such terms, however onerous they might be to one party, the parties have to be held bound by these terms.

[34] We carefully considered the judgment of the learned High Court Judge on this aspect of the appeal, but could not agree with the reasoning which led the High Court to come to a finding that the contract was lawfully terminated and there was no breach of contract by the respondent. The High Court Judge held in para. 56 of the judgment as follows:

> I had adverted to this earlier and held that the Defendant's action pursuant to section 36(2) of the Contracts Act, 1950 to terminate the contract was lawful considering that the deadline for the obtaining of the ELB approval or the validity of the SPA as reset in the Supplementary Agreement had expired.
>
> It must be repeated that it was my conclusion that there was no breach of contract by the Defendant in the circumstances.

[35] Appellant's counsel submitted that the learned High Court Judge had not fully considered the effect of cl. 4(e) in reaching this finding. We found merit in this argument. This clause was a fundamental term in the contract and it directly related to the right of termination. A failure to consider this clause would lead to a fundamental misdirection by the High Court on the law and the

facts. With respect, we found the High Court had adopted a purely textual approach to cl. 4 of the supplemental agreement. The application time was found to have been simply "re-set" by the supplemental agreement, and since no approval was purportedly obtained within the "re-set" three months from the date of the supplemental agreement, s. 36(2) operated to invalidate the SPA and the supplemental agreement. The High Court should have properly considered the effect of the approval and the certificate of approval in these circumstances. The High Court failed also to consider even the amended cl. 4(e) which allowed the appellant as purchaser to elect to terminate the contract "at any time thereafter prior to the completion of the agreement (whether the said approval shall have subsequently obtained or not)". The SPA, in defining the time for completion, gave the purchaser 4+1 months from the date of approval to pay the balance purchase price. We did consider the ambiguity in the phraseology of the amended cl. 4(e) but there was one constant factor: whether under the original or amended cl. 4(e), the option to terminate was granted to the appellant as purchaser.

[36] In any event, if the application time had been re-set by the supplemental agreement, surely it would have been incumbent on the respondent as vendor to submit a fresh application for approval, or at least to have formally contacted the Pengarah for the Department to reconsider the earlier application for approval. Had the solicitors for the respondent done so, they would have most probably found out much earlier that approval had indeed been given in 2008.

Whether Appellant Was Ready And Willing To Perform

[37] We accepted the legal position that "readiness" to perform would refer to "financial capacity", while "willingness" referred to "conduct wanting performance" or "disposition". In *Goh Hooi Yin v. Lim Teong Ghee & Ors* [1990] 2 CLJ 203; [1990] 2 CLJ (Rep) 48; [1990] 3 MLJ 23, it was held that "readiness" consisted of "having access to funds", and this requirement was not defeated merely because the party was depending on a loan to be advanced. On the facts of this present appeal, there was no dispute that the appellant was depending on a bank loan to complete its performance, ie, to pay the balance purchase price. Counsel for the appellant impressed upon this court that the

A appellant had applied for a loan from OCBC Bank even before signing the SPA. As for "willingness", the appellant had by its conduct consistently maintained it was willing to proceed with the transaction. It made its position expressly clear in the letter from its solicitors to the respondent's solicitors in which it questioned
B the termination by the respondent, adding that it was "well within your client's knowledge at all material times, our client agrees to await the approval of Estate Land", and "our client is at all times able, ready and willing to complete the purchase of the said property."

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[38] There was no credible evidence upon which the High Court could conclude that the appellant, through its conduct, manifested an unwillingness to perform its side of the bargain. The respondent in its written submission spent some time emphasising
D how it was difficult to get the directors of the appellant to execute the supplemental agreement as a matter of priority, even to the point of showing the appellant's registered address was in a locked low-cost flat, and how PW2, one of its directors, had been a bankrupt from 2001 to 2005. The appellant itself was a RM2
E company with negative reserves and had failed to submit its yearly accounts. The respondent concluded by stating "it was quite impossible that OCBC Bank would approve the plaintiff's application for the said loan." What was conveyed by OCBC Bank was merely "Indicative Terms for Credit Facilities" which was still
F subject to approval by the bank's management. See pp. 366 to 368 of appeal record, vol. 2(3), parts B & C. On p. 368, the part pertaining to the acceptance of the offer, was not signed and acknowledged by the appellant's authorised signatories.

G **[39]** The appellant replied to these arguments by stating that it was normal banking arrangement to merely offer indicative terms since the SPA was dependent on approval being given by the board. Reference was made to a letter from its advisers, Kevin Hill Advisory (M) Sdn Bhd, dated 16 April 2008, addressed to Amir & Lee, in which the respondent was informed the appellant had
H "arranged with RHB Islamic Bank" for a loan of RM10 million to finance the purchase of the estate. See p. 364 of appeal record, vol. 2(3).

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[40] There was no dispute that the deposit sum of RM1,264,800 was paid, and that was not a small sum to be dismissed as not supporting an inference of a readiness and willingness to perform the contract.

[41] The appellant also referred to cl. 8 of the SPA which in fact contemplated and allowed the appellant to apply to any financial institution for a loan to complete the transaction, as would be usual for a transaction of this magnitude.

[42] The respondent relied on the Indian Supreme Court case of *Thirugnanam v. Dr R Jagan Mohan Rao* AIR 1996 SC 116, and the following passage:

> ... To adjudge whether the Plaintiff is ready and willing to perform his part of the contract, the court must take into consideration the conduct of the Plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. The amount of consideration which he has to pay to the Defendant must of necessity be proved to be available ... the factum of his readiness is to be adjudged with reference to the conduct of the party and attending circumstances. The court may infer from the facts and circumstances whether the Plaintiff was ready and always ready and willing to perform his part of the contract ...

[43] In our view, these same principles when applied to the particular facts and circumstances of the case here, provided sufficient evidence of readiness and willingness on the part of the appellant to perform its part of the bargain. We also considered the effect of s. 11(2) of the Specific Relief Act 1950 that there was a presumption that a breach of a contract to transfer immovable property could not be adequately compensated in money terms. The facts and circumstances of this appeal could not, on an objective view, be said to be sufficient to rebut this presumption.

[44] In the totality of the case, we agreed with the general argument advanced by the appellant that it would be clearly unconscionable and wrong in law to allow the respondent to resist the appellant's claim for specific performance against the clear evidence that approval had in fact been given by the board in 2008 which at once made the contract unconditional and capable of specific performance. The purported termination by the respondent was therefore unlawful.

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Conclusion

[45] In the above premises and as earlier indicated, we unanimously allowed the appeal with agreed costs of RM25,000 for the appeal proper. We further ordered that the High Court
B order on costs was to remain. The High Court had made no order as to costs. The order of the High Court was set aside with judgment for the plaintiff entered as per prayer 17(a) of the statement of claim for specific performance.

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